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In The Supreme Court of the United States

JEANNE S. WOODFORD
and ANTHONY P. KANE,

Petitioners,

v.

VIET MIKE NGO,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, LEGAL AID SOCIETY OF THE CITY OF NEW YORK, OHIO JUSTICE AND POLICY CENTER, PRISON LAW OFFICE, PRISONERS' LEGAL SERVICES OF NEW YORK, AND THE UPTOWN PEOPLE'S LAW CENTER AS AMICI CURIAE IN SUPPORT OF THE RESPONDENT

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INTEREST OF THE AMICI CURIAE*

The amici curiae are organizations that advise and represent prisoners seeking to protect and promote their civil and constitutional rights. A description of each of the amici appears as Appendix C.

SUMMARY OF THE ARGUMENT

When Congress amended the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997e(a), with the 1996 Prison Litigation Reform Act ("PLRA"), Pub. L. No. 104-134, § 803, 110 Stat. 1321, 1321-71, it broadened the statute's coverage in several ways: exhaustion is now mandatory rather than discretionary; prisoners must now exhaust all available remedies, not just those that are "plain, speedy, and effective" under federal standards; and all federal cases concerning "prison conditions" are covered, not just § 1983 lawsuits. Compare 42 U.S.C. § 1997e(a) (current) with 42 U.S.C. § 1997e(a) (1982) (reprinted as App. A). What Congress did *not* change is the meaning of the administrative exhaustion required. See *Dep't of Housing and Urban Development v. Rucker*, 535 U.S. 125, 133 (2002) (when Congress amends a statute but does not indicate any change to a particular aspect of prior law, that aspect remains in place); *Boeing Co. v. United States*, 537 U.S. 437, 456 (2003) (same); *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978) (same). Currently, as previously, CRIPA's exhaustion provision governs the *timing*, not the *availability*, of federal court consideration of prison conditions lawsuits. No procedural default rule augments the exhaustion requirement in such cases.

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* No counsel for any party authored any part of this brief. No persons or entities other than the amici curiae made any monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk of the Court.

Statutorily mandated exhaustion rules do not necessarily include procedural default components. Rather, as this Court held in *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 514 (1982), like other issues of the "design and scope of an exhaustion requirement," "what consequences should attach to the failure to comply with procedural requirements of administrative proceedings" is an issue for which "legislative purpose . . . is of paramount importance." *Id.* at 501; see also *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992).

As originally enacted, CRIPA exhaustion did not include a procedural default rule. That is, even if a prison or jail's grievance system had been certified "plain, speedy, and effective," untimely grievances did not forfeit inmates' chance for federal adjudication. Based on CRIPA's structure, purpose, and legislative history, it is clear that had Congress intended a procedural default regime, CRIPA would have specified that grievance deadlines, along with all the other aspects of grievance procedures, be reasonable. See 42 U.S.C. § 1997e (1982) (since amended) (reprinted in App. A).

Yet petitioners and their amici ask this Court to overrule Congress's decision in the PLRA to preserve its own prior approach. The text and legislative history of the PLRA itself both confirm Congress's intent not to mandate a procedural default rule. In the text of the current exhaustion provision, by instructing litigants that they may not file a federal lawsuit "until" they have given their prison or jail system a full chance to respond to their grievances, Congress implied that exhaustion is a timing issue—that is, that an inmate who has failed to exhaust is not permanently barred from federal court but will eventually be able to sue. In addition, § 1997e(c)(2)'s direction to district judges that when they find that a case is "frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief" they may dismiss it without "*first* requiring . . . exhaustion" (emphasis added) makes clear that Congress contemplated a different course for unexhausted cases that survive the judge's initial merits screening.

In such cases, § 1997e(c)(2) authorizes courts to "first requir[e] . . . exhaustion." Congress, that is, expressly anticipated that some unexhausted inmate complainants may fix this procedural problem and (if their complaints are not resolved administratively) proceed with their federal litigation.

In addition, just *two days* prior to passage of the PLRA's amendments to CRIPA, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 ("AEDPA"), which included not one but two provisions expressly prescribing procedural default components of federal review of state convictions. The AEDPA is particularly relevant to proper construction of the PLRA, "since both sections were enacted by the [same] Congress, and both were designed to deal with closely related aspects of the same problem," *United States v. American Bldg. Maintenance Industries*, 422 U.S. 271, 277 (1975)—Congress's unhappiness with the rules governing federal court consideration of claims by inmates. Congress's nearly simultaneous enactment of an express procedural default rule in AEDPA and silence on the subject in the PLRA speaks volumes.

Finally, the result petitioners and their amici seek runs counter to the PLRA's purpose. The 1996 statute's supporters repeatedly disclaimed any desire to impede valid federal claims. One the bill's main sponsors, Senator Hatch, even suggested that any interpretation to the contrary was hyperbole by the statute's opponents: "Indeed, I do not want to prevent inmates from raising legitimate claims. While the vast majority of these claims are specious, there are cases in which prisoners' basic civil rights are denied. Contrary to the charges of some critics, however, this legislation will not prevent those claims from being raised." 141 Cong. Rec. 35,797 (Dec. 7, 1995) (statement of Sen. Hatch). But a procedural bar would indeed "prevent inmates from raising legitimate claims." Moreover, it would create sharp incentives for prison and jail officials to promulgate demanding rules with short time limits and interpret them strictly, in order to shrink inmates' opportunity to file grievances. Indeed, these effects

can already be seen in regulations and in case law. And contrary to Congress's intent to withdraw federal regulation of prison and jail grievance procedures, a procedural default rule would entangle federal courts in prison and jail policy, by requiring them to pass judgment on the consistency of individual prison and jail grievance procedures with the imperatives of § 1997e and § 1983.

ARGUMENT

Congress Intended 42 U.S.C. § 1997e(a) to Require Administrative Exhaustion of Prison Conditions Complaints, Not Procedural Default.

The Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997e(a), as amended in 1996 by the Prison Litigation Reform Act ("PLRA"), Pub. L. No. 104-134, § 803, 110 Stat. 1321, 1321-71 states, "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." In this case, there is no question that by the time he filed his lawsuit under 42 U.S.C. § 1983, the respondent, a California state prisoner who complains of restrictions preventing him from participating in religious, educational, and other prison programs, had exhausted all administrative remedies available. After an informal effort to resolve the dispute failed, respondent filed a grievance. When the prison Appeals Coordinator rejected the grievance as untimely under the prescribed 15-day deadline, respondent refiled, arguing that that rejection was erroneous because he was challenging a series of ongoing constitutional violations, including one within the prior 15 days. The State rejected this argument, and continued to refuse to entertain either his grievance or his two appeals. *Ngo v. Woodford*, 403 F.3d 620, 622 (9th Cir. 2005). No further administrative avenue of redress remains.

As this Court has held, 42 U.S.C. § 1997e(a) grants jail and prison administrators "time and opportunity to address

complaints internally before allowing the initiation of a federal case." *Porter v. Nussle*, 534 U.S. 516, 525 (2002). California's administrators have chosen not to take that opportunity, yet the petitioners now ask this Court to deny the plaintiff the federal judicial forum to which § 1983 entitles him. Even assuming that the prison Appeals Coordinator did not err in refusing to take account of the ongoing nature of the restrictions about which respondent complains, § 1997e(a) does not immunize prison and jail officials from damages when inmates have sought in good faith to grieve a matter but have stumbled over a procedural rule.

Whether a jail or prison inmate's failure to comply perfectly with state, city, or county administrative grievance procedures requires forfeiture of his subsequent federal lawsuit is a question of congressional intent. In this case, that intent is clear: the administrative exhaustion provision of 42 U.S.C. § 1997e(a) is one that requires universal deferral, but not forfeiture, of federal court consideration.

For several years after the PLRA amended CRIPA, courts appear to have, *sub silentio*, followed this more natural reading of the language and purpose of § 1997e(a), dismissing cases without prejudice to allow inmate plaintiffs to exhaust administrative remedies, notwithstanding that—as the brief filed in support of respondent by Amicus Curiae Jerome N. Frank Legal Services Organization demonstrates—in nearly every state, exhaustion deadlines would have long since expired. See, e.g., *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998), *cert. denied*, 525 U.S. 833 (1998) (holding that because a prisoner plaintiff had failed to exhaust administrative remedies, "the case should be dismissed without prejudice, and the activity that the new statute contemplates should now occur—state adjudication of the claims"); *Wendell v. Asher*, 162 F.3d 887, 892 (5th Cir. 1998) ("we note that the dismissal of Wendell's claims in this case will not cause any injustice or render judicial relief unavailable"); *Jackson v. District of Columbia*, 254 F.3d 262, 270-271 (D.C. Cir. 2001) ("Because the prisoners failed to exhaust their administrative

remedies, the district court should have dismissed the complaint without prejudice, allowing the prisoners to refile once they have completed the VDOC grievance procedures."); *Walker v. Maschner*, 270 F.3d 573, 577 (8th Cir. 2001) (dismissing plaintiff's case without prejudice and noting, "However, Walker may file a claim in federal court once he has fully exhausted his prison remedies"). Under petitioners' reading of the statute there would have been no point to these many dismissals that allowed refiling, since those refiled complaints would have been procedurally barred.[1]

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[1] In a census of State Department of Corrections administrative regulations, reported in their amicus brief, the Jerome N. Frank Legal Services Organization of the Yale Law School managed to assemble grievance procedures (often but not necessarily current) for every state system (except Alabama, whose grievance procedure the brief reports is currently under review) and the federal Bureau of Prisons. It found five states with initial deadlines for inmate grievances, "formal" or "informal," of two or three business or calendar days (Indiana, Michigan, Nebraska, Oklahoma, Rhode Island); four states with 5-day limits (Kentucky, Montana, New Mexico, North Dakota); four states with 7-day limits (Delaware, Tennessee, Utah, Wyoming); three states with 10-day limits (Arizona, Georgia, Massachusetts); sixteen states with 14 or 15-day limits (Arkansas, California, the District of Columbia, Hawaii, Idaho, Kansas, Maine, Maryland, Missouri, New York, Ohio, Pennsylvania, South Carolina, Texas, West Virginia, Wisconsin); and eight states with 30-day limits (Alaska, Colorado, Connecticut, Iowa, Mississippi, New Hampshire, Oregon, Virginia). Many of the states with 15- to 30-day limits require the inmate to have made an informal grievance during those several weeks. The federal Bureau of Prisons sets a 20-day deadline. Only four states (Illinois – 60 days; Louisiana – apparently 90 days, although the regulation is ambiguous; Nevada – six months; and North Carolina – 1 year) give inmates longer than 30 days to file grievances that may ripen into federal lawsuits. Six states (Florida, Minnesota, New Jersey, South Dakota, Vermont, Washington) do not specify deadlines in their regulations, although Florida requires prisoners to file their grievances in a "reasonable time," see Rules of the Florida Dept. of

Only after the Seventh Circuit's opinion in *Pozo v. McCaughtry*, 286 F.3d 1022 (7th Cir. 2002), *cert. denied*, 537 U.S. 949 (2002), marked the erroneous path did any Courts of Appeals adopt petitioners' flawed reading of § 1997e(a). But the circuit courts that have not followed *Pozo*—the Ninth Circuit in this case, *Ngo v. Woodford*, 403 F.3d 620 (9th Cir. 2005), the Sixth Circuit in *Thomas v. Woolum*, 337 F.3d 720 (6th Cir. 2003), and the Second Circuit in *Giano v. Goord*, 380 F.3d 670, 677-678 (2d Cir. 2004)—are clearly correct in their refusal to graft a habeas-style procedural default bar onto the statute Congress enacted.

A. Congressional intent, which has varied in different settings, determines whether a procedural default rule applies to a particular exhaustion requirement.

"[L]egislative purpose . . . is of paramount importance in the exhaustion context." *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 501 (1982), see also *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). Primary reasons for this focus, the Court explained in *Patsy*, are the "difficult questions concerning the design and scope of an exhaustion requirement." 457 U.S. at 513. As the Court summarized, among those questions are:

> how to unify and centralize the standards for judging the kinds of administrative procedures that should be exhausted; what tolling requirements and time limitations should be adopted; . . . *what consequences should attach to the failure to comply with procedural requirements of administrative proceedings*; and whether federal courts could grant necessary interim injunctive relief and hold the action pending

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Corrections, Ch. 33-103.011(1)(a). For details and sources, see Brief of Amicus Jerome N. Frank Legal Services Organization, Appendix. All the cited rules and regulations are available at http://www.law.yale.edu/Woodford.

> exhaustion, or proceed to judgment without requiring exhaustion even though exhaustion might otherwise be required, where the relevant administrative agency is either powerless or not inclined to grant such interim relief.

Id. at 514 (emphasis added).

Patsy's analysis simply cannot be squared with the erroneous suggestion by petitioners and the Solicitor General that Congress's unadorned use of the words "administrative remedies" and "exhausted" in 42 U.S.C. § 1997e(a) answers the question posed in this case—the effects of fully attempted exhaustion, where a prison or jail official has chosen to forego merits resolution because of an inmate's claimed procedural misstep. See, e.g., Petitioners' Brief at 14 ("Under this interpretation of the statutory language—that it is the administrative process that must be exhausted—the modifier 'available' can only refer to those administrative procedures that an inmate has a right to invoke before he has rendered those procedures obsolete by defaulting on them"); Brief of Amicus United States at 7 ("[I]t is well-settled that the exhaustion of remedies means the proper exhaustion of remedies, including compliance with applicable filing deadlines."); but see Brief of Amicus State of New York *et al.* ("the language of § 1997e(a) does not specifically address the issue"). The assertion that administrative exhaustion has a uniform meaning, regardless of its context, is obviously wrong.

Nor is *Patsy* alone in its support of this point. For example, in *McKart v. United States*, 395 U.S. 185 (1969), the case that "contains the Court's most comprehensive discussion of the exhaustion doctrine," Richard J. Pierce, Jr., 2 Administrative Law Treatise 969 (4th ed. 2002), the issue was almost precisely the same as in this case. The Court noted in *McKart* that it was "not faced with a premature resort to the courts—all administrative remedies are now closed to petitioner." 395 U.S. at 196-197. Rather, the issue in *McKart*, as here, was whether a party's procedural missteps in the administrative

process barred *judicial* review of the decision in question. The Court's answer was no: Notwithstanding the draftee's failure to appeal his reclassification, he was entitled to a de novo federal court hearing on that legal claim. The Court explained that while many of the reasons commonly thought to mandate a procedural default approach to administrative exhaustion "apply equally to cases like the present one," a procedural default rule would nonetheless be improper, because "[i]n Selective Service cases, the exhaustion doctrine must be tailored to fit the peculiarities of the administrative system Congress has created." *Id.* at 194, 195. See also *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 753 (1979) (holding that age discrimination plaintiff's untimely state administrative filing would not bar subsequent federal litigation).

The clear lesson of *McKart* and *Patsy* is that the present inquiry's keystone is not general theorizing about exhaustion but focused examination of Congress's intent, exhibited by the statutory structure, history, text, and purpose. In this case, that intent is clear: Congress's 1996 amendments to CRIPA were intended to strengthen prison and jail officials' opportunity to solve their own problems, not to compel federal courts to stand idle if those officials refuse to remedy constitutional violations simply because an inmate missed a grievance deadline.

The Solicitor General makes much of the fact that in *McCarthy v. Madigan*, this Court counted the potential for forfeiture of claims created by short administrative deadlines against the United States' plea that federal prisoners be required to exhaust administrative remedies prior to bringing damages actions under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). Indeed, this Court did recognize in *McCarthy v. Madigan* what has proven to be true in circuits that have adopted the rule now proposed by petitioners and the United States: that such deadlines "are a likely trap for the inexperienced and unwary inmate." *McCarthy v. Madigan*, 503 U.S. 140, 153 (1992). The dissent disagreed, but only "so long as there is an escape clause . . . and the time limit is

within a zone of reasonableness." *Id.* at 157-158 (Rehnquist, C.J., dissenting). Two points make this discussion less than persuasive authority for the Solicitor General's point. First, both the United States and the prisoner in *Madigan* urged the Court that procedural bar would follow from its adoption of the United States' position,[2] so the contrary approach was not presented to the Court. See 503 U.S. at 150 (rejecting "the rule of exhaustion *proposed* here") (emphasis added); *Central Virginia Community College v. Katz*, No. 04-885, ___ U.S. ___, 2006 WL 151985, at *4 (Jan. 23, 2006) ("we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated"). Second, in *Madigan*, the Court was considering a common law exhaustion regime, not a statutory one; the question in this case, but not that one, is of congressional intent.

B. The PLRA's amendment to § 1997e(a) altered the scope of CRIPA's administrative exhaustion requirement, but left in place the effect of inmate procedural error.

As this Court has described, prior to its 1996 amendment, § 1997e(a) set out looser rules governing administrative exhaustion by inmates. Enacted in 1980 and unchanged in pertinent part[3] until the PLRA's restrictive amendments, CRIPA originally interposed a "limited exhaustion requirement" on prisoners' § 1983 claims. *McCarthy v. Madigan*, 503 U.S. 140, 150 (1992). In particular, as originally enacted, CRIPA

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[2] Petitioner's Brief at 7, 9 & Respondents' Brief at 38, n.18, McCarthy v. Madigan, 503 U.S. 140 (1992) (No. 90-6861).

[3] The only change to the statute's original language prior to the PLRA's 1996 amendment was in 1994, when Congress substituted "exceed 180 days" for "exceed ninety days" in 1997e(a)(1); inserted "or are otherwise fair and effective" at the end of 1997e(a)(2) and 1997e(c)(1); and inserted "or is no longer fair and effective" at the end of 1997e(c)(2). Pub. L. 103-322 § 20416, 108 Stat. 1796, 1834 (1994).

authorized (but did not compel) district judges who "believe[d] that such a requirement would be appropriate and in the interests of justice" to continue inmates' § 1983 actions "in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available," where either "the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b)." 42 U.S.C. § 1997e(a)(1), (a)(2) (1982) (since amended) (reprinted in App. A).

In 1996, Congress passed the PLRA, which amended CRIPA; as the Court has twice explained, the new language of the provision broadens it to cover not only § 1983 lawsuits but *all* federal law "action[s] . . .with respect to prison conditions." 42 U.S.C. § 1997e(a). Moreover, the language requiring exhaustion is now mandatory, not discretionary, and there is no certification prerequisite. See *Booth v. Churner*, 532 U.S. 731, 739 (2001); *Porter v. Nussle*, 534 U.S. 516, 524 (2002).

While Congress in the PLRA thus broadened the exhaustion requirement in prison and jail conditions cases, and made its application mandatory, it did not mandate the procedural default rule petitioners seek. In reshaping CRIPA's exhaustion requirement, then, Congress did not hesitate to supersede its earlier approach, or to overrule judicial interpretations of the original text. See *Booth v. Churner*, 532 U.S. at 740-741 (describing the PLRA's apparent rejection of the Court's approach in *McCarthy v. Madigan*). There is, however, a prior statutory outcome that Congress showed no sign of altering: the rule that in the correctional setting administrative exhaustion concerns *when*, not *whether*, federal adjudication is available. As this Court has held, amendment of a statute leaves standing the interpretation and regulatory implementation of unamended statutory components, see *Dep't of Housing and Urban Development v. Rucker*, 535 U.S. 125, 133 n.4 (2002); *Boeing Co. v. United States*, 537 U.S. 437, 457 (2003). In this case, the *expressio unius* inference is stronger

yet. In the just-cited cases, the inference is based on a presumption that Congress knows of the interpretation or regulation in question, see *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978). Here, no such presumption is necessary; it was Congress itself that created the no-procedural-default administrative exhaustion regime in CRIPA. Congress's judgment to preserve its own prior approach deserves this Court's respect.

1. Prior to the PLRA, § 1997e's administrative exhaustion regime was one that mandated deferral, not procedural default, of federal claims.

CRIPA's original stance on the procedural default issue was clear. The exhaustion rule applied only if a prison or jail's grievance system had been certified "plain, speedy, and effective," but even then, untimely grievances did not forfeit inmates' chance for federal adjudication. We know this most especially because of the text of former § 1997e(b), which directed the Attorney General to "promulgate minimum standards for the development and implementation of a plain, speedy, and effective system for the resolution of grievances of adults confined in any jail, prison, or other correctional facility," 42 U.S.C. § 1997e(b)(1) (1982) (since amended) (reprinted in App. A), and set quite detailed rules governing fair prison and jail grievance systems, including the requirement of time limits binding the prison or jail system—without breathing a hint of concern about *inmate* filing deadlines.[4]

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[4] The statute stated:

The minimum standards shall provide--

(A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;

(B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

Similarly, the Attorney General's subsequently promulgated standards engaged in a comprehensive discussion of grievance mechanics, again with no mention of inmate filing deadlines. Office of Inmate Grievance Procedure Certification Standards for Inmate Grievance Procedures, 46 Fed. Reg. 3843-02 (Jan. 16, 1981) (codified at 28 C.F.R. § 40). It simply cannot be that the Congress that worried about grievance system fairness and responsiveness enough to promulgate requirements like deadlines for official reply and an advisory role for inmates would have designed a system in which inmate deadlines were both unregulated and dispositive as to the availability of a federal court forum for civil rights cases.[5]

The reason for this universal lack of concern about the unfair hindrance that deadlines and other technicalities might pose to inmates in the grievance process is that it was simply not in anyone's mind that untimely or otherwise technically flawed grievance filing would create any greater risk to a

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(C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

(D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

(E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.

42 U.S.C. § 1997e(b)(2) (1982) (since amended) (reprinted in App. A).

[5] The fact that prior to the PLRA, § 1997e(a)(1) (1982) (reprinted in App. A) directed courts to "continue" cases pending exhaustion—despite the fact that such claims would almost invariably be past the administrative time limit—provides some confirmation of the point that Congress thought even untimely exhaustion would suffice. But it is mere confirmation; that exhaustion was a rule sometimes deferring but never forfeiting federal adjudication does not chiefly derive from a particular word in CRIPA's text.

would-be inmate plaintiff than the ordinary risk that staleness renders relief less likely for the party with the burden of persuasion. The inescapable inference of CRIPA's omission of discussion of procedural default, waiver, or forfeiture—including its otherwise inexplicable failure to regulate grievance filing deadlines—is that no default was intended. Had Congress intended a procedural default regime, CRIPA would have specified that grievance deadlines be reasonable.

Moreover, CRIPA's legislative record supports the non-default reading. The grievance provision of CRIPA was hotly debated for over three years in House and Senate subcommittees, committees, and on the floor of both chambers.[6] In all of that record, proponents and opponents of administrative exhaustion alike discussed its likely impact as reducing the federal courts' inmate docket by resolving a proportion of complaints,[7] and *delaying* federal court consideration of the remainder.

For example, in a letter from Rep. Timothy E. Wirth to the Chairman of the relevant subcommittee, Rep. Kastenmeier, included in the hearing record, Rep. Wirth wrote of his constituents' "concern[] that this [exhaustion] clause could hold up any action to remedy an unjust situation for an unlimited amount of time and thus, negate the value of such legislation." *Civil Rights for Institutionalized Persons: Hearing on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm.*

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[6] A complete list of the many dozens of references to administrative exhaustion in the hearings and debates over the bills that became CRIPA is provided as Appendix B to this brief.

[7] See, e.g., Senate Report No. 96-416, at 34 (Nov. 15, 1979) ("The almost 10,000 prisoner suits brought to court in 1978 are swamping our judges. . . . Requiring the exhaustion of in-prison grievances should resolve some cases thereby reducing the total number and help frame the issues in the remaining cases so as to make them ready for expeditious court consideration."), *reprinted in* 1980 U.S.C.C.A.N. 787, 816.

on the Judiciary, 95th Cong. 520 (1977) ("1977 House Hearing"). Many witnesses opposing the enactment of the exhaustion provision expressed similar concerns. See, e.g., *Civil Rights of Institutionalized Persons: Hearing on S. 1393 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong. 111 (1977) ("1977 Senate Hearing") (written testimony of David S. Garcia, Staff Worker, Mental Health Advocacy Project, Los Angeles; Former Patient, Metropolitan State Hospital) (opposing exhaustion provision because it would be inconsistent with the "necess[ity] to investigate and redress violations in a timely fashion"); *id.* at 210 (oral testimony of Prof. Ivan Bodensteiner) ("Another reason not to require exhaustion is that it can often cause very harmful delay prejudicial to the rights of the individuals involved."); *id.* at 571 (statement of the Prisoner Assistance Project of the Baltimore Legal Aid Bureau, Inc.) ("An exhaustion requirement would needlessly delay, for an excessive period of time, the prisoner's right to proceed in federal court."). Others, supporting the bill, agreed that its danger was the prospect of delay of federal litigation, though they were more sanguine about the result of that delay. See, e.g., 1977 House Hearing, *supra*, at 514 (letter from Prof. Richard Singer to Rep. Rodino) ("I believe that the guidelines and safeguards written into the bill are sufficient, if properly implemented, that the prospect of dilatory tactics will be minimal.").

Had procedural *default* been contemplated, mere *delay* would not have received nearly so much attention. But there is simply no sign in the entire legislative record that an inmate's procedural misstep in the administrative process might forfeit federal court consideration of his claim. Instead, the exhaustion provision's proponents were at pains to emphasize that it would *not* impair the right to bring a lawsuit. See, e.g., 122 Cong. Rec. 3925 (Feb. 19, 1976) (statement of Rep. Railsback) (introducing the exhaustion provision's first appearance in proposed legislation, H.R. 12008, 94th Cong. (1976), and explaining, "[i]t should be stressed that the ex-

haustion requirement does not deny prisoners access to Federal courts in section 1983 suits. . . . A prisoner unsatisfied with the administrative decision would be permitted to file a section 1983 suit"). See also 1977 House Hearing, *supra*, at 856 (letter from Prof. Frank J. Remington, following up on another witness's report of Prof. Remington's views during the hearing) ("[An exhaustion] requirement does not in any way preclude his [the inmate's] opportunity to ask for federal court review of the administrative decision.").

2. The PLRA indicates Congress's intent to broaden *when* administrative exhaustion is required—not to alter the effect of a prisoner's administrative procedural errors on subsequent federal litigation.

CRIPA's current form "differs markedly" from its original incarnation. *Porter v. Nussle*, 534 U.S. 516, 524 (2002). Exhaustion is now mandatory rather than discretionary; prisoners must now exhaust all available remedies, not just those that are "plain, speedy, and effective" under federal standards; and all inmates (federal, state, local, and juvenile) are now covered for all federal cases concerning "prison conditions," not just § 1983 lawsuits. Compare 42 U.S.C. § 1997e(a) (current) with 42 U.S.C. § 1997e(a) (1982) (reprinted as App. A). Each of these changes, however, goes to *whether* exhaustion is required—not the effect in federal litigation of a prison or jail system's prior decision on procedural grounds to decline to entertain a grievance. Two of these important changes were the subject of the two prior post-PLRA inmate exhaustion cases this Court has decided. In both, the Court insisted on the importance of Congress's intent. See *Porter*, 534 U.S. at 524-530; *Booth*, 532 U.S. at 739-741. In this case, too, it is Congress's *actual* amendment of CRIPA by the PLRA to which this Court should give effect.

Nothing in either the text or the legislative history of that amendment demonstrates, or even hints at, a congressional alteration of the effect on federal litigation of procedural missteps by inmates pursuing administrative remedies. Rather,

Congress chose to leave the prior approach in place. As previously noted, amendment of a statute leaves standing the interpretation and regulatory implementation of unamended statutory components; a fortiori, in a case like this one where it was Congress itself that created the no-procedural-default administrative exhaustion regime in CRIPA, its judgment to preserve its own prior approach deserves this Court's respect.

a. Text. As the brief filed by a number of States as amici in support of the petitioners concedes, see Brief of Amicus State of New York *et al.* at 2 ("the language of § 1997e(a) does not specifically address the issue"), the current text of 42 U.S.C. § 1997e(a) does not speak directly to what happens in federal court when a prison or jail system fails to review a grievance's merits because it finds a procedural flaw. But even read without the context of CRIPA's history, the text of § 1997e as amended by the PLRA confirms the reading of the inmate administrative exhaustion rule as governing the timing, not the availability, of federal adjudication.

The statute provides in pertinent part:

> (a) **Applicability of administrative remedies**. No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.
>
> * * *
>
> (c) **Dismissal**
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> * * *
>
> (2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

42 U.S.C. § 1997e. Two words are key—"until" in § 1997e(a), and "first," in § 1997e(c)(2). Both signal Con-

gress's intent that this provision govern timing, not availability, of federal adjudication.

First, by instructing litigants that they may not file a federal lawsuit "until" they have given their prison or jail system a full chance to respond to their grievances, Congress implied that exhaustion is a timing issue—that is, that an inmate who has failed to exhaust is not permanently barred but will eventually be able to sue. See *Ngo v. Woodford*, 403 F.3d 620, 628 (9th Cir. 2005) (emphasizing difference between § 1997e(a)'s use of "until" and 28 U.S.C. § 2254(b)(1)(A)'s use of "unless").

In addition, § 1997e(c)(2)'s direction to district judges that when they find that a case is "frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief" they may dismiss it without "*first* requiring . . . exhaustion" (emphasis added) makes clear that Congress contemplated a different course for unexhausted cases that survive the judge's initial merits screening. In such cases, § 1997e(c)(2) authorizes courts to "first requir[e] . . . exhaustion." Congress, that is, expressly anticipated that some unexhausted inmate complainants may fix this procedural problem and perhaps (if their complaints are not resolved administratively) proceed with their federal litigation. Congress's intent in this regard would be foiled by petitioners' procedural default approach, because the vast majority of correctional grievance systems set time limits on inmate complaints that would make such a post-filing fix untimely. In nearly every prison and jail, grievance deadlines are simply too short. See *supra* note 1.

Finally, had Congress intended the reading now proposed by petitioners and their amici, it would have been natural for Congress to include, as it did not, "failure to exhaust properly" in the list of legal flaws that merit dismissal of prison conditions suits, which the very same section of the PLRA inserted into the very same section of CRIPA. See 42 U.S.C.

§ 1997e(c)(1): "The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." Pub. L. No. 104-134, § 803(d).

In short the PLRA's text supports the argument that the administrative exhaustion regime governing inmate litigation requires universal recourse to administrative remedies by inmate would-be plaintiffs, but does not hold their federal claims waived by technical error in the administrative grievance process.

b. Committee reports and other legislative history. There is only one relevant legislative committee report, about H.R. 667, 104th Cong. (1995), the bill whose Titles II and III, with some alterations, became the PLRA. That report, too, suggests that the PLRA's supporters intended to broaden the applicability and shift the timing of the pre-amendment CRIPA exhaustion requirement, not change its nature. In this earlier version of the PLRA, the bill did not propose to extend CRIPA's exhaustion requirement to non-§ 1983 actions, or to grievance systems not certified as "fair, speedy, and effective." But otherwise the operative language of its exhaustion provision was identical to the statute enacted: it would have eliminated CRIPA's prior textual reference to "continu[ance]" and substituted "no action shall be brought . . . until such . . . administrative remedies as are available are exhausted." H.R. 667 § 201. Yet the House Judiciary Committee Report on H.R. 667 describes the difference between extant requirements and those H.R. 667 would have effectuated as relating to the timing of the exhaustion requirement, not the effect in litigation of administrative procedural failures: "Currently, the Civil Rights of Institutionalized Person Act authorizes federal courts to suspend civil rights suits brought by prison-

ers pursuant to 42 U.S.C. sec. 1983 for 180 days while the prisoner exhausts available administrative remedies. This section requires prisoners to exhaust all available administrative remedies before filing a civil rights action in a federal court." H. Rep. No. 104-21, at 22 (1995). Moreover, the Committee wrote: "First, it requires that all administrative remedies be exhausted prior to a prisoner initiating a civil rights action in court. Second, it requires the court to dismiss any prisoner suit if it fails to state a legitimate claim of a violation for which relief can be granted, or if the suit is frivolous or malicious." *Id.* at 7. That is, the Committee's explanation, like the resulting statute, treats exhaustion separately from the question of which prison lawsuits fail to merit relief.

c. Another nearly simultaneous enactment. In addition, the 1996 Congress was well aware of the variety of extant approaches to exhaustion and of its crucial role in specifying precisely what regime it intended. Indeed, just *two days* prior to passage of the PLRA's amendments to CRIPA, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), which included not one but two provisions specifically prescribing procedural default components of federal review of state convictions. In that Act, Congress amended 28 U.S.C. § 2254(e)(2) to specify, "If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows [one of two limited exceptions]." AEDPA § 104, 110 Stat. 1214, 1218. And Congress also provided that (in certain specified circumstances[8]) "[w]henever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been

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[8] 28 U.S.C. § 2264(a) applies only to States that meet "certain conditions, including provision for appointment of postconviction counsel in state proceedings." *Lindh v. Murphy*, 521 U.S. 320, 327 (1997).

raised and decided on the merits in the State courts, unless the failure to raise the claim properly [falls under one of three narrow exceptions]." 28 U.S.C. § 2264(a), AEDPA § 107, 110 Stat. 1214, 1223. Unlike 42 U.S.C. § 1997e(a), both of these provisions expressly enact procedural default principles. Congress's silence on the subject in the PLRA speaks volumes.

Indeed, the AEDPA is particularly relevant to proper construction of the PLRA, because "both sections were enacted by the [same] Congress, and both were designed to deal with closely related aspects of the same problem," *United States v. American Bldg. Maintenance Industries*, 422 U.S. 271, 277 (1975)—Congress's unhappiness with the rules governing federal court consideration of claims by inmates. Just as the Court has effectuated the express habeas procedural default rules in AEDPA, the Court should effectuate Congress's decision *not* to interject a procedural default rule into CRIPA exhaustion.

d. The habeas analogy. Petitioners and their amici argue that § 1997e(a)'s word "exhausted" can properly be analogized to the procedural default doctrine governing habeas corpus. See Petitioners' Brief at 26-30; Brief of Amicus United States at 12-15; Brief of Amicus New York *et al.* at 18-20. But Congress showed no sign in the PLRA of incorporating habeas doctrine in particular into CRIPA exhaustion; even if it did so intend, one can only assume that the habeas doctrine it incorporated was the one to which it referred, exhaustion, not procedural default.

It is true, as petitioners and their amici suggest, that in the habeas area this Court has followed a strict procedural default approach. Petitioners seeking a federal writ of habeas corpus generally forfeit claims they failed to present properly to state courts, see, e.g., *Coleman v. Thompson*, 501 U.S. 722 (1991), unless they can show "cause and prejudice" for the default, *Murray v. Carrier*, 477 U.S. 478, 485-492 (1986), or that "a

fundamental miscarriage of justice" would result from its enforcement, *id.* at 495-497.

But it is implausible that Congress meant in 42 U.S.C. § 1997e(a) to incorporate habeas doctrine in particular, given that habeas doctrine requires exhaustion of state judicial review opportunities, not "administrative remedies"; the absence of any other textual or historical hint that Congress meant to analogize to habeas doctrine; and the many other settings in which statutes require administrative exhaustion. Part and parcel of the Court's insistence that the "design and scope" of exhaustion requirements derive from specific legislative text and purpose, *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 513 (1982), is that such wholesale incorporation should not simply be assumed. Moreover, even if Congress *did* intend exhaustion under § 1997e(a) to particularly reflect habeas doctrine, the obvious reference would be the habeas doctrine of *exhaustion*, not the habeas doctrine of procedural default.[9]

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[9] While procedural default in the habeas context is obviously closely connected to administrative exhaustion, the Court has insisted that the two remain distinct; they work in harmony, not in unison. Most recently, in *O'Sullivan v. Boerckel*, the Court took pains to note, "We do not disagree with Justice Stevens' general description of the law of exhaustion and procedural default. Specifically, we do not disagree with his description of the interplay of these two doctrines." 526 U.S. 838, 848 (1999). Justice Stevens in turn distinguished between "two analytically distinct judge-made rules: (1) the timing rule, first announced in *Ex parte Royall*, 117 U.S. 241 (1886), and later codified at 28 U.S.C. § 2254(b)(1), that requires a state prisoner to exhaust his state remedies before seeking a federal writ of habeas corpus; and (2) the waiver, or so-called procedural default, rule, applied in cases like *Francis v. Henderson*, 425 U.S. 536 (1976), that forecloses relief even when the petitioner has exhausted his remedies." *Id.* at 850 (Stevens, J., dissenting). Moreover, even if the Seventh Circuit were correct in *Pozo v. McCaughtry*'s aggressive reading of *O'Sullivan v. Boerckel*, in which the court of appeals erroneously held that *Boerckel* drasti-

Moreover, the federalism concerns underlying habeas exhaustion, which center around concerns of comity between the judicial systems of coordinate sovereigns, simply are not applicable either to the substance of complaints about prison or jail conditions or to the kinds of informal, not-even-quasi-judicial administrative procedures that are most typical in the Nation's prisons and jails for resolving grievances that cover topics from food to medical care to religion to discipline.

e. Overall congressional purpose. Congress's choice not to draft a procedural default rule makes eminent sense, because such a provision would undermine rather than further the purpose of the PLRA. Twice in the past several years, this Court has examined that purpose in detail. Most recently, it explained:

> Beyond doubt, Congress enacted §1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case. In some instances, corrective action taken in response to an inmate's grievance might improve prison administration and satisfy the inmate, thereby obviating the need for litigation. *Booth*, 532 U.S., at 737. In other instances, the internal review might "filter out some frivolous claims." *Ibid.* And for cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies the contours of the controversy. See *ibid.*; see also *Madigan*, 503 U.S., at 146.

Porter v. Nussle, 534 U.S. 516, 524-525 (2002).

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cally reworked habeas procedural default and habeas exhaustion to render them essentially one and the same, 286 F.3d 1022, 1024 (7th Cir. 2002), *cert. denied*, 537 U.S. 949 (2002), that purported reworking postdated the PLRA's amendment to CRIPA by over three years and therefore could not have been in Congress's mind.

Consistent with the Court's description in *Porter*, the PLRA's supporters repeatedly denied any effort to impede valid federal claims. For example, when he introduced one version of the PLRA in the Senate, Senator Kyl stated: "If we achieve a 50-percent reduction in bogus Federal prisoner claims, we will free up judicial resources for claims with merit by both prisoners and nonprisoners." 141 Cong. Rec. 38,276 (Dec. 21, 1995) (statement introducing S. 1495, 104th Cong.; § 101 was an exhaustion provision). Senator Hatch even suggested that any interpretation to the contrary was hyperbole by the statute's opponents: "Indeed, I do not want to prevent inmates from raising legitimate claims. While the vast majority of these claims are specious, there are cases in which prisoners' basic civil rights are denied. Contrary to the charges of some critics, however, this legislation will not prevent those claims from being raised." 141 Cong. Rec. 35,797 (Dec. 7, 1995) (statement of Sen. Hatch); see also 141 Cong. Rec. 27,042 (Sept. 29, 1995) (similar statement of Sen. Hatch); *id.* at 27,044 (statement of Sen. Thurmond) (PLRA would continue to allow "meritorious claims to be filed").

Instead, the PLRA was preeminently a statute about returning first responsibility for prison and jail conditions to prison and jail administrators. As the statute's chief sponsor in the Senate explained, "we must curtail interference by the Federal courts themselves in the orderly administration of our prisons. This is not to say that we will have no court relief available for prisoner suits, only that we will try to retain it for cases where it is needed while curtailing its destructive use." 141 Cong. Rec. 26,449 (Sept. 26, 1995) (statement of Sen. Abraham); see also 141 Cong. Rec. 26,553 (Sept. 27, 1995) (statement of Sen. Hatch) ("We believe . . . that it is time to . . . return . . . control to competent administrators appointed to look out for society's interests as well as the legitimate needs of prisoners."); 141 Cong. Rec. 27,042 (Sept. 29, 1995) (similar statement of Sen. Hatch).

Yet the reading petitioners seek would inevitably place federal courts into the very regulatory posture Congress was

trying to alter, forcing those courts to decide whether a given prison or jail unjustifiably hindered an inmate plaintiff's access to its grievance system. For example, the Seventh Circuit, originator of the procedural default rule, has noted that grievance regulations operate under a "constraint": "no prison system may establish a requirement inconsistent with the federal policy underlying § 1983 and § 1997e(a). See *Robertson v. Wegmann*, 436 U.S. 584 (1978)." *Strong v. David*, 297 F.3d 646, 649 (7th Cir. 2002). As this Court held in *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 648 (1990), state "provisions [that] cannot be viewed as permissible interstitial regulation in the service of, or at least neutral with respect to, the purposes of the federal scheme" are impermissible. If procedural default is interjected into the statute Congress wrote, it will become necessary for federal courts to examine whether onerous prison and jail procedures—short deadlines, difficult pleading requirements, and the like—are or are not "neutral," in these terms.

More important, far from encouraging administrative handling of the sometimes frivolous but sometimes extremely serious complaints of inmates, petitioners' proposed rule would actually provide an incentive to administrators in the state and federal prison systems and the over 3000 county and city jail systems[10] to fashion ever higher procedural hurdles in their grievance processes. After all, the more onerous the grievance rules, the less likely a prison or jail, or staff members, will have to pay damages or be subjected to an injunction in a subsequent lawsuit. Already there is evidence that prisons and jails are heading in this direction. For example, in July 2002, in *Strong v. David*, 297 F.3d 646 (7th Cir. 2002), the Seventh Circuit reversed the district court's dismissal of a case for failure to exhaust; in rejecting the defendants' argument that the plaintiff's grievances were

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[10] James J. Stephan, U.S. Dep't of Justice, Bureau of Justice Statistics, *Census of Jails, 1999*, at 5 (Aug. 2001), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/cj99.pdf.

insufficiently specific, the court noted that the Illinois prison grievance rules were silent as to the requisite level of specificity. Less than six months later, the Illinois Department of Corrections proposed new regulations that provided:

> The grievance shall contain factual details regarding each aspect of the offender's complaint including what happened, when, where, and the name of each person who is the subject of or who is otherwise involved in the complaint.

Ill. Admin. Code tit. 20, § 504.810(b) (2006); see 26 Ill. Reg. 18065, at § 504.810(b) (Dec. 27, 2002) (proposing amendment).[11]

As *Strong v. David* demonstrates, lateness is not the only issue in exhaustion cases. Wardens and sheriffs routinely refuse to engage inmate grievances because grievants commit minor technical errors, such as using the incorrect form, see, e.g., *Richardson v. Spurlock*, 260 F.3d 495, 499 (5th Cir. 2001); sending the right documentation to the wrong official, see, e.g., *Keys v. Craig*, No. 05-2285, 2005 WL 3304140, at *1 (3d Cir. Dec. 7, 2005);[12] failing to name a relevant official

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[11]Indeed, the rules can be even more onerous than they appear; given the monetary and other stakes, prison and jail systems have been, unsurprisingly, extraordinarily rigid in their invocation of their procedural rules. Moreover, some district courts have held that administrative decisions of untimeliness are beyond the permissible bounds of federal reexamination. See, e.g., *Lindell v. O'Donnell*, No. 05-C-04-C, 2005 WL 2740999, at *18 (W.D. Wis. Oct. 21, 2005) (rejecting plaintiff's request that the court "find that prison officials wrongly applied Wisconsin regulations regarding the time limits for filing an inmate complaint" as "not a challenge federal courts may address").

[12]In *Keys*, the Third Circuit affirmed the district court's dismissal of a pro se inmate's lawsuit, finding that he had successfully reached the third level of administrative review, but then defaulted because he failed to attach copies of required documents. The plaintiff conceded that he had submitted the third-level appeal without the documents; he explained that his prison took two weeks

in the complaint (even if prison administrators have actual knowledge of that official's role in the incident), see, e.g., *Williams v. Hollibaugh*, No. Civ. 3:04-CV-2155, 2006 WL 59334, at *5-*6 (M.D. Pa. Jan. 10, 2006); or failing to file separate forms for each complaint, even if the interpretation of a single claim as raising two separate complaints is the prison administration's, *Harper v. Laufenberg*, No. 04-C-699-C, 2005 WL 79009, at *3 (W.D. Wis. Jan. 6, 2005).[13]

The Court's adoption of a procedural default principle would likely aggravate the problem. In fact, even when prison and jail administrators *want* to resolve a complaint on its merits, the approach petitioners and their amici ask this Court to take discourages them from doing so, and therefore actually undermines the very interest in self-governance they assert and that Congress intended to serve. The Seventh Circuit has held squarely that "when a state treats a filing as timely and resolves it on the merits, the federal judiciary will not second-guess that action, for the grievance has served its function of alerting the state and inviting corrective action." *Riccardo v. Rausch*, 375 F.3d 521, 524 (7th Cir. 2004), *cert. denied*, 125 S.Ct. 1589 (2005). In that case, the Illinois Department of Corrections' discretionary decision to review, on

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to make the requisite copies. The Court of Appeals found that his late documentary submission was inadequate because made to the wrong prison official.

[13] In *Harper*, the inmate plaintiff complained in a medical grievance, within the prescribed 14 days, that a correctional officer had encouraged him to attempt suicide. Prison staff construed the complaint to raise two issues – "a claim relating to his failure to receive mental health treatment for his suicidal thoughts and a claim relating to defendant Laufenberg's alleged insensitive and unprofessional remarks." *Id.* at *3. The grievance was thus deemed noncompliant with the Wisconsin Administrative Code's rule limiting grievances to one issue. Thirteen days later the plaintiff resubmitted his complaint; it was rejected as untimely; plaintiff properly appealed. The district court dismissed the case for untimeliness in the attempt to exhaust.

the merits, an untimely failure-to-protect grievance in an in-cell rape case nearly cost the state $1.5 million; a jury verdict for that amount was reversed on the merits (over a panel dissent and three judges' dissents from denial of rehearing en banc). Had the state simply rejected the grievance as time-barred—as it appears it could have—the monetary risk to state officials would have been entirely obviated. Can anyone reasonably expect a governmental agency to resist this kind of incentive to avoid merits consideration of grievances? The officials in question are a varied group—elected jailers and sheriffs, appointed jail superintendents, professional wardens, politically appointed commissioners. What they all have in common is an understandable interest in avoiding adverse judgments against themselves or their colleagues, in their official or personal capacities.

In short, petitioners seek authorization to set up pleading traps and procedural hurdles for would-be civil rights plaintiffs. This Court should deny that request as entirely inconsistent with the statute Congress wrote, which this Court has found was intended to give prison officials a chance to solve problems and head off litigation, not to multiply the procedural pitfalls for lay persons seeking to vindicate their civil rights. Even if the broadest purpose of the Prison Litigation Reform Act was anti-prison litigation—a characterization resisted by its supporters, who insisted they were not hostile to meritorious claims—this Court has cautioned:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525-526 (1987) (per curiam). As Justice Scalia has explained, " 'The Act must do everything necessary to achieve its broad purpose' is

the slogan of the enthusiast, not the analytical tool of the arbiter." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 726 (1995) (Scalia, J., dissenting).

"Prisoner suits under 42 U.S.C. § 1983 can illustrate our legal order at its best and its worst." *Crawford-El v. Britton*, 523 U.S. 574, 601 (1998) (Kennedy, J., concurring). In the PLRA, Congress undertook a limited reform of CRIPA's exhaustion requirement, not to frustrate federal adjudication of prisoners' claims but to enhance that consideration. Like the Court, Congress knows that "even as to prisoners the government must obey always the Constitution." *Id.* This Court should not assume, without support in either text, structure, or history, that Congress intended to undermine the judicial remedies that enforce the government's obligation.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed. If, however, this Court rejects the view just presented and holds that 42 U.S.C. § 1997e(a)'s exhaustion requirement does include a procedural default component, it should hold that such a rule must be tailored to the statutory scheme of the civil rights statutes and CRIPA as amended by the PLRA. In particular, it should recognize that "technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process," *Love v. Pullman*, 404 U.S. 522, 526 (1972), and remand for decision on the many complex issues raised by a rule of procedural default in the context of prison and jail grievance systems and their often draconian deadlines. Should the ongoing nature of the harm alleged by the plaintiff render his grievance timely? Is the state's resolution of that issue (via regulation or administrative decision) dispositive or is the issue a legal one subject to de novo adjudication in the federal court? Is the standard one of good faith effort to com-

ply with administrative requirements? Substantial compliance? Does a plaintiff's reasonable belief as to the requirements of the grievance system control, or are jail and prison inmates to be penalized for reasonable misunderstandings or based on officials' post hoc interpretations of their rules? These are questions the courts of appeals have only begun to ask and answer. If the Court institutes a procedural default regime, it should allow the court of appeals to assess the application and appropriate resolution of these questions in the first instance in this case.

Respectfully submitted,

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APPENDIX A

The Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247 § 7, 94 Stat. 349, 352-353 (1980) (42 U.S.C. § 1997e as originally enacted)

EXHAUSTION OF REMEDIES.

(a)(1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.

(2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b).

(b)(1) No later than one hundred eighty days after the date of enactment of this Act, the Attorney General shall, after consultation with persons, State and local agencies, and organizations with background and expertise in the area of corrections, promulgate minimum standards for the development and implementation of a plain, speedy, and effective system for the resolution of grievances of adults confined in any jail, prison, or other correctional facility. The Attorney General shall submit such proposed standards for publication in the Federal Register in accordance with section 553 of title 5, United States Code. Such standards shall take effect thirty legislative days after publication unless, within such period, either House of Congress adopts a resolution of disapproval of such standards.

(2) The minimum standards shall provide—

(A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;

(B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

(C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

(D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

(E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.

(c)(1) The Attorney General shall develop a procedure for the prompt review and certification of systems for the resolution of grievances of adults confined in any jail, prison, or other correctional facility, or pretrial detention facility, to determine if such systems, as voluntarily submitted by the various States and political subdivisions, are in substantial compliance with the minimum standards promulgated under subsection (b).

(2) The Attorney General may suspend or withdraw the certification under paragraph (1) at any time that he has reasonable cause to believe that the grievance procedure is no longer in substantial compliance with the minimum standards promulgated under subsection (b).

(d) The failure of a State to adopt or adhere to an administrative grievance procedure consistent with this section shall not constitute the basis for an action under section 3 or 5 of this Act.

APPENDIX B
Legislative History of the Administrative Exhaustion Provision of the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997e, Pub. L. No. 96-247 § 7, 94 Stat. 349, 352-353 (1980)

This Appendix sets out each of the official sources of the legislative history of the Civil Rights of Institutionalized Persons Act. All known references to CRIPA's administrative exhaustion provision within that history are noted.

The 94th Congress

House bill: H.R. 12008, 94th Cong (1976) (sec. 4 is an exhaustion provision) (introduced by Rep. Railsback on the proposal of Attorney General Edward Levi); see 122 Cong. Rec. 3925 (1976) (statement of Rep. Railsback). After referral to the Judiciary Committee, no further action was taken.

The 95th Congress

House bills: H.R. 2439, 95th Cong. (1977) (no exhaustion provision); H.R. 5791, 95th Cong. (1977) (sec. 4 is an exhaustion provision); H.R. 9400, 95th Cong. (1977) (sec. 5 is about exhaustion).

Senate bills: S. 1393, 95th Cong. (1977) (no exhaustion provision).

House Hearings: *Civil Rights for Institutionalized Persons: Hearing on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary,* 95th Cong. (Apr. 29, May 11, 13, 18 & 23, 1977).

See especially *id.* at 20-23, 33-34, 322-325 (oral and written testimony, and supplemental materials of Drew S. Days III, Assistant Att'y Gen., Civil Rights Division, U.S. Dep't of Justice); *id.* at 43, 47, 54, 58, 366 (oral and written testimony, and supplemental materials of Charles R. Halpern, Member,

Am. Bar Ass'n Comm'n on the Mentally Disabled); *id.* at 48-53 (written testimony of Hon. Sylvia Bacon, Member, Am. Bar Ass'n Comm'n on Correctional Facilities and Services); *id.* at 57-58 (oral testimony of Melvin T. Axilbund, Staff Dir., Am. Bar Ass'n Comm'n on Correctional Facilities and Services); *id.* at 69-70, 77-78 (oral and written testimony of Jay Lawrence Lichtman, Deputy Dir., Defender Division, Nat'l Legal Aid and Defender Ass'n); *id.* at 90 (written statement of C. Raymond Marvin, Washington Counsel, Nat'l Ass'n of Attorneys Gen., provided in support of the testimony of Hon. John D. Ashcroft, Att'y Gen., State of Missouri); *id.* at 98 (letter from Scott McAlister, Assistant Att'y Gen., State of Oregon, provided in support of General Ashcroft's testimony); *id.* at 101, 111 (oral testimony of Hon. John D. Ashcroft, Att'y Gen., State of Missouri); *id.* at 108 (questioning by Rep. Railsback); *id.* at 117, 122-123, 328 (oral and written testimony, and supplemental materials of Alvin Bronstein, Executive Dir., Nat'l Prison Project, Am. Civil Liberties Union); *id.* at 147-148 (exchange between Mr. Bronstein and Rep. Railsback); *id.* at 155-157 (exhange between Mr. Bronstein and several committee members); *id.* at 164-165 (oral testimony of Prof. Abram Chayes, Harvard Law School); *id.* at 169, 173-174 (exchanges between Prof. Chayes and members of the committee); *id.* at 227-237 (oral and written testimony of Hon. Ruggero J. Aldisert, Judge, U.S. Court of Appeals for the Third Circuit); *id.* at 238, 441 (oral testimony and supplemental materials of Stanley C. Van Ness, Comm'r, Dep't of the Public Advocate, State of New Jersey); *id.* at 253-254, 259, 271-272 (written and oral testimony of Stephen P. Berzon, Legal Dir., Children's Defense Fund); *id.* at 263-264, 267, 439 (oral and written testimony of Michael S. Lottman, Dir., Education Law Center, Newark, N.J.); *id.* at 274, 276, 280-281, 282 (oral and written testimony of Edward C. King and Toby Sambol Edelman, Staff Attorneys, Nat'l Senior Citizens Law Center); *id.* at 479 (letter from Laurence Gilbert, Supervising Att'y, Research Office, Legal Aid and Defender Ass'n of Detroit); *id.* at 492-495

(1977) (letter from William D. Leeke, Comm'r, South Carolina Dep't of Corrections, and President, Am. Correctional Ass'n); *id.* at 513-514 (letter from Prof. Richard Singer, Rutgers Law School); *id.* at 516 (letter from Kenneth M. Streit, Wisconsin Ass'n for Retarded Citizens, Inc.); *id.* at 517 (letter from William B. Spann, Jr., President, Am. Bar Ass'n); *id.* at 519 (statement of Nat'l Ass'n for Retarded Citizens); *id.* at 520 (letter from Linden Thorn, Executive Dir., Florida Ass'n for Retarded Children); *id.* at 520 (letter from Hon. Timothy E. Wirth, Member, U.S. House of Representatives); *id.* at 529 (letter from John L. Hill, Att'y Gen., State of Texas); *id.* at 533 (letter from V. Frank Mendicino, Att'y Gen., State of Wyoming); *id.* at 615-757 (Appendix 7—Materials on Correctional Grievance Procedures); *id.* at 856-857 (letter from Prof. Frank Remington, U. Wisc. Law School).

Senate Hearings: *Civil Rights of Institutionalized Persons: Hearing on S. 1393 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong. (June 17, 22, 23, 30, & July 1, 1977).
See especially *id.* at 13, 34-35 (oral and written testimony of Hon. Drew S. Days III., Assistant Att'y Gen., Civil Rights Division, U.S. Dep't of Justice); *id.* at 111 (written testimony of David S. Garcia, Staff Worker, Mental Health Advocacy Project, Los Angeles; Former Patient, Metro. State Hosp.); *id.* at 187, 189-190 (written testimony of Charles R. Halpern, on behalf of the Am. Bar Ass'n); *id.* at 193, 197 (oral and written testimony of Dr. Philip Roos, Executive Dir., Nat'l Ass'n for Retarded Citizens); *id.* at 209-210, 214 (oral and written testimony of Prof. Ivan Bodensteiner, Valparaiso University); *id.* at 412, 413, 415-417 (oral and written testimony of William D. Leeke, Comm'r, South Carolina Dep't of Corrections and President, Am. Correctional Ass'n) (oral testimony presented by Anthony P. Travisono on behalf of Comm'r Leeke); *id.* at 420, 437-438 (oral and written testimony of Irving R. Segal, Am. Bar Ass'n Comm'n on Correctional Facilities and Services); *id.* at 439-443 (Am. Bar Ass'n Comm'n on Correc-

tional Facilities and Services and Comm'n on the Mentally Disabled, Report to the Am. Bar Ass'n House of Delegates, submitted as exhibit to statement of Irving R. Segal); *id.* at 464, 468 (oral and written testimony of Morton Posner, Executive Dir., Federation of Parents Organizations for the N.Y. State Mental Institutions); *id.* at 556 (written statement of V. Frank Mendicino, Att'y Gen., State of Wyoming); *id.* at 569-571 (statement of the Prisoner Assistance Project of the Baltimore Legal Aid Bureau, Inc.); *id.* at 617 (written testimony of Robert B. Hansen, Att'y Gen., State of Utah); *id.* at 638, 642 (oral and written testimony of Alvin J. Bronstein, Executive Dir., Nat'l Prison Project, Am. Civil Liberties Union); *id.* at 772, 779 (oral and written testimony of William G. Nagel, Executive Vice President, The Am. Foundation, Inc., Institute of Corrections, Philadelphia, PA); *id.* at 791-792, 796-797 (oral and written testimony of Stephen P. Berzon, Legal Dir., Children's Defense Fund); *id.* at 902, 909 (oral and written testimony of Edward C. King and Toby Sambol Edelman, Attorneys, Nat'l Senior Citizens Law Center, Washington, D.C.).

House Reports:
H.R. Rep. No. 95-1058 (1978) (reporting H.R. 9400 from the Judiciary Committee).
See especially *id.* at 28-30, 33.

Senate Reports:
S. Rep. No. 95-1056 (1978) (reporting S. 1393 from the Judiciary Committee).
See especially *id.* at 37.

House Floor Debates:
May 1, 1978: 124 Cong. Rec. 11,974-11,990. See especially *id.* at 11976 (statement of Rep. Kastenmeier); *id.* at 11982 (exchange between Rep. Railsback and Rep. Sawyer).
May 25, 1978: 124 Cong. Rec. 15,441-15,447. See especially *id.* at 15,441 (reprinted letter from Att'y Gen. Griffin Bell to

Rep. Peter W. Rodino, Chairman, House Comm. on the Judiciary, submitted as part of statement of Rep. Kastenmeier).
July 28, 1978: 124 Cong. Rec. 23,175-23,188. See especially *id.* at 23,179-23,182 (exchange involving many members of Congress).

The 96th Congress
House bills:
Civil Rights of Institutionalized Persons Act, H.R. 10, 96th Cong. (1979) (sec. 4 is about exhaustion).

Senate bills:
S. 10, 96th Cong. (1979) (sec. 5 is about exhaustion).

House hearings:
Civil Rights of Institutionalized Persons: Hearings on H.R. 10 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong. (Feb. 14 & 15, 1979).
See especially *id.* at 3 (statement of Rep. Kastenmeier); *id.* at 4 (written statement of Rep. Railsback); *id.* at 9, 13 (oral and written testimony of Hon. Drew S. Days III, Asst. Att'y Gen., Civil Rights Div.); *id.* at 23-26 (exchange among Rep. Kastenmeier, Rep. Sawyer, General Days); *id.* at 32-33 (exchange between Rep. Gudger and General Days); *id.* at 48-49 (testimony of Peggy Weisenberg, Staff Att'y, Am. Civil Liberties Union Nat'l Prison Project); *id.* at 340-341 (letter from John H. Lashly, Chairman, Am. Bar Ass'n); *id.* at 349 (letter from Elaine R. Jones and Charles Stephen Ralston, NAACP Legal Def. and Educ. Fund, Inc.); *id.* at 354 (letter from Junius W. Williams, President, Nat'l Bar Ass'n); *id.* at 386-388, 394-399 (passages from William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 Harv. L. Rev. 610, 633-635, 641-646 (1979)).

Senate hearings:
Civil Rights of the Institutionalized: Hearings on S. 10 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 96th Cong. (Feb. 9, March 28 & 29, 1979).
No discussion of exhaustion.

House reports:
H.R. Rep. No. 96-80 (1979) (reporting H.R. 10 to the House from the Judiciary Committee).
See especially *id.* at 3, 4, 22-25; *id.* at 26 (letter from Alice Rivlin, Dir., Cong. Budget Office); *id.* at 28 (supplemental views of Rep. Volkmer); *id.* at 29 (supplemental views of Rep. Sensenbrenner); *id.* at 30 (dissenting views of Rep. Kindness).

Senate reports:
S. Rep. No. 96-416 (1979), *reprinted in* 1980 U.S.C.C.A.N. 787 (reporting S. 10 from the Judiciary Committee).
See especially *id.* at 34, 35, 42.

Conference report:
H.R. Conf. Rep. No. 96-897 (1980), *reprinted in part in* 1980 U.S.C.C.A.N. 832.
See especially *id.* at 9, 15-17.

House floor debate:
May 16, 1979: 125 Cong. Rec. 11,459-11,461.
May 23, 1979: 125 Cong. Rec. 12,489-12,508. See especially *id.* at 12,490 (statement of Rep. Harris); *id.* at 12,491-12,492 (statement of Rep. Drinan); *id.* at 12493 (statement of Rep. Kastenmeier); *id.* at 12,494 (statements of Rep. Rodino and Rep. McClory); *id.* at 12,496 (statement of Rep. Butler); *id.* at 12497 (statement of Rep. Fish and exchange between Rep. Volkmer and Rep. Kastenmeier); *id.* at 12,498 (statement of Rep. Sawyer); *id.* at 12,503 (statement of Rep. Gudger).
May 12, 1980: 126 Cong. Rec. 10,780-10,783. See especially *id.* at 10,780 (statement of Rep. Kastenmeier).

Senate floor debate:
May 24, 1979: 126 Cong. Rec. 12,816-12,820.
Feb. 26, 1980: 126 Cong. Rec. 3710-3748.
See especially *id.* at 3716 (statement of Sen. Hatch); *id.* at 3720-3721 (statement of Sen. Cranston); *id.* at 3736 (statement of Sen. Cochran).
Feb. 27, 1980: 126 Cong. Rec. 3936-4001, 4020. See especially *id.* at 3970 (statement of Sen. Bayh).
Feb. 28, 1980: 126 Cong. Rec. 4177, 4180-4195.
Apr. 23, 1980: 126 Cong. Rec. 8767-8768.
Apr. 24, 1980: 126 Cong. Rec. 8929-8961.
Apr. 25, 1980: 126 Cong. Rec. 9147.
Apr. 28, 1980: 126 Cong. Rec. 9175-9176.
Apr. 30, 1980: 126 Cong. Rec. 9394-9403.
May 1, 1980: 126 Cong. Rec. 9578-9604.
May 6, 1980: 126 Cong. Rec 9980-10,007. See especially *id.* at 10,004, 10,005 (statement of Sen. Hatch).

Signing Statement:
Statement on Signing H.R. 10 Into Law (May 23, 1980), Public Papers of the Presidents, Jimmy Carter, Vol. 1, pp. 965-966 (1981).

Appendix C: Descriptions of the Amici Curiae

The **American Civil Liberties Union** ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members, dedicated to the principles of liberty and equality embodied in the Constitution and this Nation's civil rights laws. Consistent with that mission, the National Prison Project of the ACLU Foundation was established in 1972 to protect and promote the civil and constitutional rights of prisoners. The **American Civil Liberties Union of Northern California** is a regional affiliate of the ACLU.

The **Legal Aid Society of the City of New York** is a private organization that has provided free legal assistance to indigent persons in New York City for nearly 125 years. Through its Prisoners' Rights Project, the Society seeks to ensure that prisoners are afforded full protection of their constitutional and statutory rights. The Society advocates on behalf of prisoners in New York City jails and New York state prisons, and conducts litigation on prison conditions.

Established in 1997, the **Ohio Justice & Policy Center** (formerly Prison Reform Advocacy Center) is a public interest, nonprofit law firm that litigates to enforce constitutional standards regarding prisoners' medical care, safety and other conditions of confinement and advises prisoners on how to exhaust administrative remedies. The Ohio Justice & Policy Center has also worked to educate the Sixth Circuit Court of Appeals about the various prison grievance systems that exist in the states of the Sixth Circuit.

For over 25 years the **Prison Law Office**, a nonprofit public interest law firm, has been in the forefront of legal efforts to enforce the Constitution and other laws inside the walls of California's prisons. Located just outside the gates of San Quentin, the Prison Law Office represents individual prisoners, engages in class action and other impact litigation, educates the public about prison conditions, and provides technical assistance to attorneys throughout the country.

Prisoners' Legal Services of New York (PLS) is a non-profit state-wide organization that provides legal representation to indigent prisoners in an effort to protect and promote their civil and human rights. Founded in 1976 in response to 1971's devastating Attica riot, PLS receives more than 8000 requests for assistance annually and represents hundreds of inmates every year. The McKay Commission determined that two major reasons for the Attica riot were inadequate redress of grievances and lack of access of prisoners to the courts. Thus PLS is keenly interested in ensuring that meritorious claims by prisoners are heard by the courts and not dismissed due to a prisoner's inability to comply with arbitrary state-imposed grievance deadlines.

The **Uptown People's Law Center** ("UPLC") is a non-profit legal service center serving poor and working people of Chicago. In addition to its legal work for community residents, UPLC represents prisoners in challenges to prison conditions, the parole system, and a variety of other matters. UPLC has litigated exhaustion issues in a wide variety of prison cases from the inception of the PLRA to the present, and receives hundreds of letters yearly from prisoners seeking advice on what steps they must take to properly exhaust administrative remedies.